BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 25	)	
of the Cable Television Consumer	)	MM Docket 93-25
Protection and Competition Act of 1992	)	
	)	
Direct Broadcast Satellite	)	
Public Service Obligations	)	

To: The Commission

REPLY

Time Warner Cable,[1] by its attorneys and pursuant to Section 1.429(g) of the Commission's rules,[2] hereby responds to the comments filed by various parties regarding the petitions for reconsideration of the Commission's Report and Order in MM Docket 93-25, FCC 98-307, released November 25, 1998 ("DBS Public Interest Order").[3] Time Warner Cable's petition for reconsideration of the Commission's DBS Public Interest Order ("Time Warner Petition") challenged

[1]Time Warner Cable, a division of Time Warner Entertainment Company, L.P., operates numerous cable television systems across the United States. An affiliate of Time Warner Cable holds an interest in PRIMESTAR Partners, L.P., a direct-to-home satellite programming service provider. Other affiliates of Time Warner Cable provide programming to multichannel video programming distributors ("MVPDs").

[2]47 C.F.R. § 1.429(g).

[3]47 C.F.R. § 1.429(g) provides that replies to oppositions to petitions for reconsideration shall be filed within 10 days after the time for filing oppositions has expired. Oppositions in this proceeding were originally due to be filed by May 6, 1999, 64 Fed. Reg. 19540 (Apr. 21, 1999), but the opposition deadline was extended to May 20, 1999 in response to an extension request filed by the Satellite Broadcasting and Communications Association. Order in MM Docket No. 93-25, DA 99-907, released May 14, 1999 ("Extension Order"). The Extension Order provided that replies would be due on or before June 1, 1999. However, this calculation does not account for the extra three days (excluding holidays) available for responding to pleadings required to be served by mail and in fact served by mail. See 47 C.F.R. § 1.429(f). Thus, replies in the instant proceeding are due to be filed by June 3, 1999. 47 C.F.R. § 1.4(h).

the Commission's conclusions therein in three respects: (1) at a minimum, DBS providers should be subject to public interest obligations equivalent to cable operators' public, educational and governmental ("PEG") access obligations; (2) DBS providers cannot be allowed to fulfill the 4% channel capacity set-aside requirement through the carriage of noncommercial programming of an educational or informational nature already carried on their DBS systems; and (3) public interest obligations should apply to high power DBS providers, not DBS licensees.

I. MEANINGFUL PUBLIC INTEREST OBLIGATIONS MUST BE IMPOSED UPON DBS SERVICE PROVIDERS

Section 335(a) of the Communications Act directs the Commission to initiate a rulemaking proceeding "to impose, on providers of direct broadcast satellite service, public interest or other requirements for providing video programming" that shall, *at a minimum*, include certain political broadcasting requirements. This statutory section clearly directs that appropriate public interest obligations, in addition to political broadcasting requirements, must be imposed on DBS providers. Although the statute leaves the Commission wide latitude to determine what those other public interest obligations should be, it does not leave the Commission free to impose no such obligations. Unfortunately, as detailed in the Time Warner Petition, despite the Commission's conclusion that "Section 335(a) provides ample authority for us to impose other public interest programming requirements on DBS providers . . . ."[4], in its DBS Public Interest Order, the Commission abdicated its statutory duty to impose any public interest obligations on DBS providers in addition to the bare minimum mandated by statute because, according to the Commission, DBS "is a relatively new entrant attempting to compete with an established, financially stable cable industry" and the

[4]DBS Public Interest Order at ¶ 64.

Commission does not wish to "hinder the development of DBS as a viable competitor to cable."[5] The Commission relied on such excuses for not complying with the Section 335(a) statutory mandate despite the fact that nothing in the statute or the legislative history indicates that the Commission was allowed or supposed to take supposed competitive concerns into account in fashioning DBS public interest obligations.[6]

Not surprisingly, in opposition, DIRECTV, Inc. ("DIRECTV") gladly adopts the Commission's "new entrant" rationale as an excuse for why the DBS industry should be completely unfettered by public interest responsibilities comparable to those borne by both OVS and cable operators.[7] However, DIRECTV is utterly unable to explain why it is appropriate to impose local PEG financial support obligations on OVS operators but not on DBS service providers, particularly in light of the fact that OVS operators share "new entrant" status with DBS service providers but certainly do not share the large (and exponentially growing) subscriber base already enjoyed by the DBS industry.[8] The Satellite Broadcasting and Communications Association ("SBCA") does not even attempt to explain why OVS operators should comply with numerous regulatory obligations but DBS providers should not, preferring instead to use its response as a bully pulpit to attack the cable industry.[9]

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[5]Id. at ¶ 60.

[6]Moreover, such concerns are inappropriate given the fact that DBS providers generally have greater channel capacity than cable operators yet are already freed from many government-imposed channel requirements, such as leased access.

[7]Opposition and Comments of DIRECTV, Inc., filed May 6, 1999, at 2-4 ("DIRECTV Opposition").

[8]Id. at 7.

[9]Opposition and Comments of the Satellite Broadcasting and Communications Association, filed May 20, 1999, at 2-6 ("SBCA Opposition").

The cable industry already was subject to extensive public service obligations and regulatory restrictions at a time when it only served 1.575 million subscribers nationwide.[10] The OVS industry similarly now must meet a wide array of such obligations at a time when it serves approximately 66,000 subscribers nationwide.[11] By contrast, the DBS industry now boasts some 9.61 million subscribers nationwide, an increase of approximately 550,000 subscribers since the Time Warner Petition was filed almost three months ago in early March, 1999.[12] Two DBS service providers rank among the top ten MVPDs nationwide in subscribership.[13] Yet, amazingly, DIRECTV and the SBCA argue that it is still too early to impose any meaningful public interest obligations on the DBS industry despite the fact that the cable and OVS industries were forced to bear such responsibilities at times when those industries experienced nowhere near the success now enjoyed by DBS service providers nationwide.

The most serious blow to the "new entrant" rationale for why DBS should be exempt from meaningful public service obligations is the fact, as noted above, that the much smaller but equally "new" OVS industry must comply with the very obligations the DBS industry seeks to avoid. DIRECTV argues that because Congress specifically outlined certain Title VI regulations to which OVS operators would be subject, but did not specifically impose those same Title VI regulations on the DBS industry, "well-established" principles of statutory construction dictate that Congress' use of particular language in one section of the statute coupled with the failure to use that identical language

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[10] See Time Warner Petition at 7.

[11] Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, Fifth Annual Report, CS Docket No. 98-102, FCC 98-335, Table C-1 (rel. Dec. 23, 1998).

[12] See http://www.dbsdish.com/dbsdata.html (DBS subscriber statistics as of May 28, 1999).

[13] "DBS Poised for Continued Growth, Panelists Say at Satellite 99," Communications Daily, Feb. 5, 1999, at 4-5.

in another part of the same statute evidences an intent to exempt DBS service providers from the types of regulations imposed on OVS operators.[14]

To the contrary, a simple and straightforward reading of Section 335(a) inescapably leads to the conclusion that Congress purposefully chose to require the Commission to fashion meaningful public service obligations for DBS providers, as opposed to the narrow language Congress used with respect to OVS regulatory obligations. As noted earlier, Section 335(a) of the Communications Act directs the Commission to initiate a rulemaking proceeding to impose "public interest or other requirements" on DBS service providers which "shall, at a minimum" include certain political broadcasting requirements. The straightforward language of this statutory provision demonstrates congressional understanding and intent that additional public interest requirements could be imposed on the DBS industry beyond the specifically enumerated, statutory "minimum" political broadcasting requirements.

In its DBS Public Interest Order, even the Commission recognized that "Section 335(a) provides ample authority for us to impose other public interest programming requirements on DBS providers . . . ."[15] Express statutory language requiring the Commission to initiate a rulemaking proceeding to determine the exact scope of those additional public interest requirements reflects Congress' directive for the Commission to determine what those additional public interest requirements would be. The fact that Congress specifically enumerated certain regulatory obligations for OVS, but chose to allow the Commission to determine what public interest obligations would apply to DBS, has no bearing whatsoever on Time Warner Cable's appeal to basic principles of fairness and regulatory parity in noting that the Commission's excuse that the DBS industry should be

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[14]DIRECTV Opposition at 7.

[15]DBS Public Interest Order at ¶ 64.

exempt from certain public interest obligations because it is a "new entrant" rings hollow in light of the regulatory burdens already borne by OVS.[16]

While the Commission also states that "DBS and cable are separate and distinct services, warranting separate and distinct obligations,"[17] it is beyond dispute that DBS providers have attempted to design a service that, from the consumer's perspective, is essentially indistinguishable from cable television service.[18] The Commission also believes that different regulatory treatment among DBS, OVS and cable providers is justified because DBS is currently primarily a national service, compared to the more local or regional character of cable and OVS operators.[19] While Time Warner Cable again disputes the legal validity of any such distinction, to the extent that DBS service can currently be properly characterized as primarily national in scope, pending legislative changes to the Satellite Home Viewer Act will provide DBS with the ability to develop a "local" or "regional" character. In any event, while DBS is still primarily a national service, there is no rational basis to exempt DBS service providers from regulatory obligations that are not specifically tied to providing locally-oriented programming, such as regulations regarding access to programming, channel occupancy limits, leased access, regulation of carriage agreements, negative option billing practices, anti-buy-through, commercial limits on children's programming, implementation of a national emergency alert system, and protection of subscriber privacy.

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[16]Such discriminatory treatment additionally implicates the Equal Protection guarantee of the U.S. Constitution and casts doubt on the importance of the government's interest in imposing a full panoply of public interest requirements on cable operators but not DBS providers.

[17]Id. at ¶ 59.

[18]Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, Fifth Annual Report, CS Docket No. 98-102, FCC 98-335, ¶ 63 (rel. Dec. 23, 1998).

[19]DBS Public Interest Order at ¶ 59.

In order to implement Congressional intent, DBS service providers must be subject to financial support requirements analogous to the obligations borne by both cable and OVS providers to provide funding to support the creation of local programming to air on PEG access channels. In its Petition, Time Warner Cable suggested that DBS providers should be required to contribute 5% of their gross receipts to support the creation and development of programming aired on PBS.[20] The Alliance for Community Media and DAETC and CME, *et al.* take issue with Time Warner Cable's conclusion that PBS serves as a national surrogate for non-commercial PEG programming.[21]

Time Warner Cable understands that contributions to PBS would not be an exact national equivalent of the local PEG access support obligations currently borne by both cable and OVS operators. Nevertheless, the most crucial issue is that the DBS industry must be required to immediately make some form of meaningful financial contribution which rises to the level of local PEG access support imposed on cable and OVS. The Commission is free to determine how best to achieve a national approximation of local PEG access support, whether or not it adopts Time Warner Cable's specific proposal. Or, as the Alliance for Community Media suggests, the Commission could determine that DBS providers should immediately begin setting aside 5% of their gross receipts for public services purposes.[22] Such amounts might be held in escrow until such time when DBS is authorized to retransmit local broadcast signals, and thus transitions from a "national" to a "local" service. At such time, local communities could apply for a share of this funding to create local programming, much in the same way OVS providers must negotiate with local communities to arrive

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[20]Time Warner Petition at 10.

[21]Response of Alliance for Community Media to Time Warner Cable Petition for Reconsideration, filed May 20, 1999, at 3 ("Alliance for Community Media Response"); Opposition to and Response to Petitions for Reconsideration of DAETC and CME, *et al.*, filed May 6, 1999, at 23 n.24 ("DAETC and CME, *et al.* Opposition").

[22]Alliance for Community Media Response at 3-4.

at local programming financial support obligations which approximate those borne by cable operators. Such an approach would certainly fulfill the Section 335(a) mandate that the Commission "examine the opportunities that the establishment of direct broadcast satellite service provides for the principle of localism . . . ." The important issue is that DBS service providers immediately must bear similar programming support obligations to those imposed on cable and OVS operators. The argument that DBS is primarily national in scope while cable and OVS are not simply cannot serve as an excuse to exempt DBS service providers from any meaningful public interest obligations whatsoever.[23]

II. TIME WARNER'S DATE CERTAIN PROPOSAL REGARDING THE FOUR PERCENT CHANNEL CAPACITY SET-ASIDE REQUIREMENT

In its Petition, Time Warner Cable advocated that the Commission amend its proposed DBS channel capacity set-aside rules to mandate that DBS providers cannot satisfy the 4% channel capacity reservation through the carriage of noncommercial programming of an educational or informational nature that was carried as of the effective date of the channel capacity set-aside rules.[24] DIRECTV argues that Section 335 contains no basis for such a limitation, and when Congress intends to impose a "date-certain" approach, it does so in the statutory text.[25] While Congress has in fact specifically denoted "date-certain" requirements in other contexts,[26] its failure to do so in Section 335(b) does not

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[23]Further, Time Warner Cable reiterates that when DBS does obtain Congressional authority to carry local broadcast signals, the regulatory burdens cable now bears that are associated with the carriage of such local broadcast stations -- for example, must-carry, local television station cross-ownership restrictions, network nonduplication, syndicated exclusivity and sports blackout requirements -- obviously must also be borne by DBS operators.

[24]Time Warner Petition at 12-15. DAETC and CME, *et al.* support Time Warner Cable's proposal. DAETC and CME, *et al.* Opposition at 23-25.

[25]DIRECTV Opposition at 14.

[26]See 47 U.S.C. § 532(i)(1) (no programming provided by a cable system as of July 1, 1990 could

(continued...)

remove the Commission's obligation to implement that statutory subsection in a manner consistent with the overarching goals of the Communications Act.

Indeed, in enacting Section 335(b)(1), Congress provided the Commission with some discretion regarding the exact amount of channel capacity DBS providers should be required to set aside for noncommercial programming of an educational or informational nature, based on the statute's purposes. While Time Warner Cable believes the Commission's selection of a 4 percent channel capacity set-aside is questionable in light of the comments above, the Commission chose to impose the bare minimum channel capacity set-aside on DBS providers.[27] Time Warner Cable believes it was clearly inappropriate for the Commission to permit DBS providers to satisfy the 4 percent channel capacity set-aside requirement by carrying otherwise eligible programming services carried as of the effective date of the channel capacity reservation rules.

In order for the 4 percent channel capacity reservation requirement to be truly meaningful and to serve the recognized goal of providing a forum for "noncommercial voices that otherwise might not be heard" and to "make available to the U.S. viewing public a greater variety of educational and informational programs,"[28] it is imperative that DBS providers not be allowed to satisfy the channel capacity set-aside requirement by merely continuing to carry noncommercial educational or informational program services they already carry. If the channel capacity set-aside requirement could be satisfied in such a fashion, there would be no need for the 4 percent channel capacity reservation in the first place. With respect to both DIRECTV's and the SBCA's claim that Time

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[26](...continued)
qualify as minority or educational programming for purposes of the use of 33% of the leased access channel capacity set-aside for the provision of programming from a qualified minority or educational programming source).

[27]DBS Public Interest Order at ¶ 74.

[28]Id. at ¶¶ 116-17.

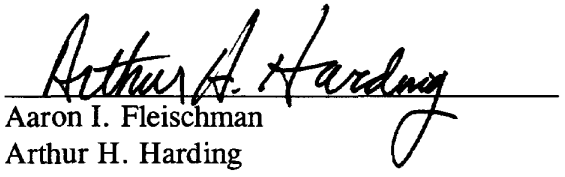
Warner Cable's "date-certain" proposal would penalize the DBS industry for carrying noncommercial programming of an educational or informational nature prior to the implementation of the channel capacity set-aside requirement,[29] Time Warner Cable notes that cable operators voluntarily carry a substantial amount of noncommercial programming but are not permitted to use such carriage to offset their PEG obligations.

III. CONCLUSION

Time Warner Cable thus respectfully reiterates the proposals outlined in the Time Warner Petition that the Commission reconsider its DBS Public Interest Order in the following three material respects: (1) at a minimum, DBS providers should be subject to public interest obligations equivalent to cable operators' public, educational and governmental ("PEG") access obligations; (2) DBS providers cannot be allowed to fulfill the 4 percent channel capacity set-aside requirement through the carriage of noncommercial programming of an educational or informational nature already carried on their DBS systems; and (3) public interest obligations should apply to high power DBS providers, not DBS licensees.

Respectfully submitted,

TIME WARNER CABLE



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[29]DIRECTV Opposition at 14-15; SBCA Opposition at 7.

CERTIFICATE OF SERVICE

I, Barbara J. Chatman, a secretary at the law firm of Fleischman and Walsh, L.L.P., hereby certify that copies of the foregoing "Reply" were served this 3rd day of June, 1999, via first-class mail, postage prepaid, upon the following:

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